

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 137 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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HORMAZIJ FAKIRJI SAGAR

Versus

NARIMAN FAKIRJI SAGAR(DECEASED)

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Appearance:

MR RR MARSHALL for Appellant  
SERVED for Respondent No. 1  
MR KS NANAVATI for Respondent No. 5  
UNSERVED for Respondent No. 6

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CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 08/09/97

ORAL JUDGEMENT

This appeal is directed against the order dated September 26, 1986 passed by the learned Civil Judge (Senior Division), Navsari, rejecting the application filed by the appellant-plaintiff for restoration of the suit which was previously dismissed for default by the learned trial Judge.

2. The appellant-plaintiff had filed Special Civil Suit No. 14 of 1984 for partition of the suit

properties. As the appellant-plaintiff was bedridden on account of paralysis, the appellant had given Power of Attorney to his son. The evidence of the son had already commenced but he could not remain present on one occasion and the trial court dismissed the suit.

3. The appellant therefore, filed restoration application being Misc.Civil Application No.16 of 1985 which was fixed for hearing on September 26, 1986. On that day, the learned counsel for the appellant had come from Valsad to Navsari to argue the case and he had waited till 2.00 O'clock, but as he was feeling feverish, he filed a sick note and placed it on record. The trial court thereafter took up the restoration application for hearing and rejected the sick note as also the restoration application. Aggrieved by the said orders, the appellant-plaintiff has approached this Court by filing the present appeal.

4. The trial court has rejected the sick note on the ground that the matter is not for hearing arguments but for recording evidence of the appellant and therefore, the presence of Mr. M.B. Pardiwala, who was appearing as counsel for the appellant was not necessary since the advocate on record was already there.

5. It appears that the trial court has not found any fault with the appellant while dismissing the restoration application. It is an admitted fact that since the original appellant is bedridden on account of paralysis,

his son was appearing as Power of Attorney for the appellant, and therefore, in the facts and circumstances of the case, the trial court ought to have taken a reasonable and pragmatic view of the matter and ought to have restored the suit and permitted the appellant to proceed with the recording of evidence on the next date.

6. In this connection, it is necessary to point out that when the sick note of the advocate is rejected, the trial court must bring it to the notice of the litigant that alternative arrangement be made by the next date of hearing and atleast one adjournment ought to have been granted.

7. The present Appeal From Order is pending for hearing since last ten years and it is the appellant himself who has suffered for all these years. However, the appellant should be put to some terms and be required to pay costs of Rs. 1,000/- to the respondent-defendants. The appeal is accordingly allowed and the restoration application is also allowed subject to the condition that the appellant-plaintiff deposits the cost of Rs.1,000/- before the trial court on or before October 24, 1997.

8. The appeal is accordingly disposed of in terms of the aforesaid directions.

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Amp/-